IN THE

SUPREME COURT OF THE UNITED STATES

Misc. Nos. 248 and 240

KENJI DOHIHARA and KOICHI KIDO, TAKASUMI OKA, KENRYO SATO, SHIGETARO SHIMADA and SHIGENORI TOGO, citizens and nationals of Japan, appearing by their attorney and next friend, William Logan, Jr.,

Petitioners,

vs.

1. General of the Army Douglas MacArthur, individually and as General of the Army of the United States in the Military Occupied Territory of Japan and as Supreme Commander for the Allied Powers. 2. Lieut. General Walton H. Walker, individually and as Commander of the 8th Army of the United States in the Military Occupied Territory of Japan. 3. James V. Forrestal, individually and as Secretary of National Defense of the United States, and 4. Kenneth C. Royall, individually and as Secretary, Department of the Army of the United States, and 5. General Omar H. Bradley, indiyidually and as Chief of Staff of the United States Army,

Defendants.

PETITION FOR REHEARING

John G. Brannon
Legal Section, G.H.Q.
SCAP -- A.P.O. 500
San Francisco, California
Attorney for Petitioners

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Comes now petitioners above named and respectfully present this, their petition for rehearing of the above entitled causes, for the reasons hereinafter set forth.

I.

Petitioners recite that this Honorable Court in the above entitled proceedings has refused them permission for leave to file petitions for writs of habeas corpus. In refusing such permission this Court predicated its decision upon its finding that the tribunal in Tokyo, Japan, which sentences these petitioners, was not a tribunal of the United States. Because it was not a tribunal of the United States and because it was set up by General Douglas A. MacArthur as the agent of the Allied Powers, this Court decreed that the courts of the United States have no power or authority to review, to affirm, set aside or annul the judgment and sentences so imposed upon these petitioners. The Court thereupon, for the reasons stated,

denied the motions of petitioners for leave to file petitions for writs of habeas corpus.

II.

Petitioners respectfully represent to this Honorable Court that the status, national or international, of the tribunal sentencing these petitioners is not concerned in this proceeding and that the Court has failed to consider, insofar as its brief ruling reveals, the all-important and vital issue involved. The vital question brought before this Court for determination is whether the Executive of the United States and the military authorities thereunder have exceeded their lawful authority or acted in contravention of the expressed terms of the Constitution of the United States in creating, or participating in the creation of, a classification of offenses under the Law of Nations designated as Crimes against Peace, which are the crimes with which these petitioners were charged and convicted.

III.

Whether or not the tribunal which sentenced these petitioners was in fact or theory a national or international tribunal is of no consequence whatsoever insofar as the question here propounded is concerned. It is the creation of the law used by and binding upon that tribunal to which our attention must be directed. If the American creation or participation in the creation of the offense of Crimes against Peace was illegal and in contravention of the Constitution of the United States, petitioners maintain that insofar as the United States is concerned their imprisonment is unlawful and illegal, giving birth to their right to petition this Court for the relief prayed for. (Ex Parte Quirin, 317 U.S. 1. In re Yamashita, 66 Sup. Ct. 340).

IV.

Petitioners respectfully represent that the Constitution of the United States, Article I, Section 8, Clause 10, thereof, delegates to the Congress of the United States alone the power to define Offenses against the Law of Nations insofar as the United States is concerned. This Court has heretofore announced that Congress and the President, like the courts, possess no power not derived from the Constitution (Ex-Parte Quirin, supra).

(2)

Congress did not define crimes against peace as an Offense

against the Law of Nations. The executive, acting through the military, did so define this offense. (Joint Chief of Staff Directive, Brief, p. 48). The utterances of the Executive, whether made alone or in conjunction with other nations, do not become part of the fundamental law of the United States. The fundamental law of the land is of three sources: (1) The Constitution, (2) the laws of the United States made in pursuance thereof, and (3) treaties. (Constitution of the United States, Article VI).

Executive agreements do not, therefore, rise to the dignity of the fundamental law of the land. And it follows clearly that, if even treaties are invalid if in violation of or inconsistent with the Constitution, Executive Agreements which clearly oppugn the express provisions of the Constitution must be subject to condemnation by this Court as unconstitutional and void. (See Brief - Page 22, 23).

V.

If the Executive action of the United States in creating or participating in the creation of Crimes against Peace, as an offense recognizable by the United States as a violation of the Law of Nations, is unconstitutional and void, it is not susceptible of good reasoning to maintain that the said Executive act becomes valid and legal when done in conjunction with other nations. The doing of an illegal act in collaboration with other nations does not and cannot deprive this Court of its right to examine the executive action from purely an American standpoint. This Court has the right and the power to direct its attention to the American action alone insofar as the creation of Crimes against Peace is concerned and to adjudge the legality or illegality thereof. If petitioners were charged with an offense created in violation of the Constituion of the United States what is to prevent this Court from so ruling and from ordering their release insofar as the United States is concerned? Such action as may be taken hereafter by the other Allied Nations is not within the province of this Court to discuss. But it is within the scope and purview of this Court to rule upon the American action and to signal the path to be followed in the future.

Petitioners, therefore, respectfully allege and maintain that it is only the action of the United States, as heretofore described, which is brought into issue by these motions for leave to file petitions for habeas corpus. Since this Court has not denied its original jurisdiction in habeas corpus, or has not announced the law concerning lower court

jurisdiction in habeas corpus where petitioners are outside the territorial limits of a Federal court, it is respectfully submitted that the matters herein set forth are subject to the keen consideration of this Court and that petitioners should and ought to be afforded the right and privilege of having their petitions for habeas corpus entertained and finally adjudicated upon the merits.

VI

WHEREFORE, the premises considered, petitioners pray that a rehearing be granted and that insofar as the United States is concerned, any action contemplated by the United States in carrying out or participating in the sentences imposed upon petitioners be stayed pending final adjudication of this petition.

John G. Brannon
Legal Section, G.H.Q.
SCAP -- A.P.O. 500
San Francisco, California
Attorney for petitioners

CERTIFICATE OF COUNSEL

I, John G. Brannon, an attorney and counsellor regularly admitted to practice in the Supreme Court of the United States, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and that in my opinion said petition is well founded.

John G. Brannon